

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5807 of 1984

with

SPECIAL CIVIL APPLICATION No 2770 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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HASMUKHLAL D. PANCHAL & ANR.

Versus

STATE OF GUJARAT & ORS.  
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Appearance:

1. Special Civil Application No. 5807 of 1984  
MS KETTY A MEHTA for Petitioner  
MR MUKESH PATEL for Respondent No. 1, 2, 3
2. Special Civil Application No 2770 of 1986  
MS KETTY A MEHTA for Petitioner  
MR MUKESH PATEL for Respondent

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 10/01/97

ORAL JUDGEMENT

1. As both these petitions proceed on the same facts and grounds, the same are being disposed of by this common order.

2. The facts of the case are taken from Special Civil Application No.5807 of 1984.

The petitioners, in all two, filed this Special Civil Application before this court and prayer has been made for quashing and setting aside the order by which their services were sought to be terminated by the Director of Agriculture and further directions to the respondent not to terminate their services. Further prayer has been made for the grant of interim relief. After filing this petition, the same has been amended and further prayer has been made for giving to the petitioners the increments which were illegally stopped and further directions that the petitioners were entitled to continue in the service without passing the departmental examination.

3. The petitioners were initially appointed as Supervisor in the Office of the Superintending Engineer, P.W.D. at Ahmedabad. The petitioners were retrenched from the services. The Government had recommended that the Director of Agriculture may give appointment to the petitioners on suitable posts as well as others who were retrenched in the identical manner. One of the other persons was Purshottambhai Shankerbhai Patel, who is the petitioner in Special Civil Application No.2770/86. Accordingly the petitioners and that person aforesaid were given the appointment as Assistant Agricultural Engineer by the Director of Agriculture, Government of Gujarat, at Ahmedabad, and they were posted in the Office of the Assistant Agricultural Engineer in different districts.

4. One of the conditions of the appointment order of the petitioners dated 27-5-1976 was that they will have to appear before the Departmental Selection Committee and to pass the test prescribed by the said committee. Some other conditions were also attached to the order of appointment regarding giving language examination, fitness certificate etc.. It is a case of the petitioners that there was no condition in the order dated 27th May, 1986 that the petitioners have to pass the Departmental Accounts Examination. It has further been stated by the petitioners that the day on which they were appointed in the service, there was no Departmental Accounts Examination prescribed by the Government for the

post of Assistant Agricultural Engineer.

5. In the year 1978, the petitioners appeared before the Departmental Selection Committee and all were being selected and under the order dated 31st May, 1978, they were given the appointment. In this order, admittedly, there was condition whereunder the petitioners have to pass the Departmental Accounts Examination. The petitioners have come up with a case that before them several persons were also appointed on the post of Assistant Agricultural Engineer on the condition that they will be required to go through the selection by the Departmental Selection Committee and in their appointment order there was a condition that they should pass the departmental examination within a period of two years. Those persons and the petitioners were identically situated as former were also appointed initially without going through the procedure of selection committee. Those persons were appointed on 25th May, 1974. The said batch of the persons appeared before the selection committee and they were also appointed on the similar terms as the petitioners under the order dated 3rd December, 1974.

6. The Departmental Examination Rules were for the first time made on 20th August, 1978 and the persons working as Agricultural Engineers were required to pass the said examination on or after 20th August, 1976. It is not in dispute that these Rules were framed on 20th August, 1978, effective from 20th August, 1976. Regarding earlier batch of persons, it was pointed out that they were initially recruited on 20-5-1974 and therefore, if they have passed the test before the selection committee they should be regularised from the initial date i.e. with effect from 21st May, 1974. In the case of those persons, under the order dated 1-3-1976 passed by the Director of Agriculture, Government of Gujarat, their services were continued on regular basis with effect from their initial date of appointment. The appointment of those persons were treated to be regular from the date of their initial appointment, and as such, they were not required to pass the examination which was prescribed under the Rules, 1978, with effect from 20th August, 1976. So that class of persons stood exempted from passing of the examination as prescribed under the Rules, 1978.

7. The petitioners were appointed on 27th May, 1976, i.e. earlier to coming into force of the Rules, 1978, but after selection by selection committee they have been appointed on 31st May, 1978, and in case their

appointment would have been made regular from the date of the initial appointment then they were not required to pass the departmental examination as prescribed under the Rules, 1978.

8. The grievance of the petitioners is that a discrimination has been made in the case of the similarly situated persons. In the case of the appointees of the year 1974, their appointment has been regularised from the date of their initial appointment, and as such, they have been given the benefit of exemption from passing of the examination as required under the Rules, 1978, but the same treatment was not given to the petitioners. The petitioners met Shri Mankad, Joint Director of Agriculture, Government of Gujarat, and represented before him that in view of the fact that the earlier batch of persons were regularised with effect from the initial date of their appointment, the petitioners may also be regularised from the date of their initial appointment as they are similarly situated and if they are regularised according to the said demand, they will not be required to pass the examination which was prescribed with effect from 20th August, 1976, on the same basis as it was done in the case of earlier batch.

9. Under the letter dated 1-12-1982 of the Director of Agriculture, Government of Gujarat, the petitioners were informed that they have to pass the departmental examination for regularisation of their services. The grievance of the petitioners is that the Director of Agriculture has not given the reply to the claim of the petitioners for their regularisation in services from the date of initial appointment. The petitioners then approached to the Secretary of the Department by their representation dated 10th May, 1982 against the insistence of the Director of Agriculture of passing by them the departmental examination. The petitioners have made out a case that they are entitled for regularisation of their services from the date of their initial appointment. It has further been stated by them that in case their services are regularised from the date of their initial appointment then they will not be required to pass the examination on the same ground on which the earlier appointees were exempted from passing the said examination. A reminder was sent by the petitioner on 20th April, 1983. The petitioners were informed under the letter dated 16th November, 1983 from the Section Officer of the Agricultural Department that first they should make a representation in person before the Director of Agriculture. In compliance of the said letter, the petitioners were called for hearing by the

Director of Agriculture on 21st November, 1983, and they have given all their points, but no reply has been received by them.

10. In para No.8 of the Special Civil Application, the petitioners have stated that they have reliably learnt that the Director of Agriculture has passed an order of termination of services of the petitioners on the ground that they have not passed the Departmental Accounts Examination. The petitioners further stated that the Director of Agriculture has already sent the order to Office of the Joint Director of Agriculture, Surat, and it will be served to the Office of the Agricultural Engineer, Ukai Project, Navsari, and thereupon the petitioners will be immediately relieved from service. The petitioners also raised a dispute regarding their entitlement of the increment which appears to have been withhold as they have not passed the Departmental Accounts Examination.

11. The writ petition has been amended, as stated earlier, and the petitioners have reiterated therein that their case is identical to the case of the appointees of the first batch i.e. 23rd May, 1974. In the amendment, the petitioners have given out the reference to the case of mechanics of the Agricultural Department who were promoted to the post of Assistant Agricultural Engineer. The Government has exempted those promotees, who have been appointed on 21st January, 1982 from passing of the Departmental Accounts Examination. Further reference has been made to some circulars whereunder the petitioners have claim the benefit of the increment from the date of their initial appointment.

12. In this case, notice was issued by this court to the respondents No.2 and 3 on 23rd November, 1984 and interim relief in terms of Para no.15(c) has been granted. Para No.15(c) reads as under:

pending hearing and final disposal of this petition, the execution, implementation, or operation of the order of termination being passed against the petitioners by the Director of Agriculture be stayed; and the Director of Agriculture, Gujarat State and the Agricultural Engineer, Ukai Project, Navsari be directed not to relieve the petitioners from the post of AGE and they be further directed to continue the petitioners in service on the same post held by them;

13. The petitioners have approached to this court before the order of termination of services has been served. Even the order of termination has not been produced before this court, though the prayer has been made for setting aside of the said order. The way in which the petitioners approached to this court is wholly unwarranted and unjustified. They should have waited for the order of termination and then should have come before this court otherwise the stage at which they have come before this court, the matter was premature. However, this court cannot quash the order which is not filed on record. Reference in this respect may be made to the decision of the Hon'ble Supreme Court in the case of Surinder Singh vs. Central Government reported in AIR 1986 SC 2166.

14. Though at one point of time, I thought to dismiss the petition only on this ground, but I do not consider appropriate to adopt this course. It is an admitted case of the respondent that the order of termination of the petitioners has been made and the same could not be served as meanwhile this court had protected the petitioners.

15. In the Special Civil Application No. 2770 of 1986, the petitioner therein has come to this court after first approaching to the Gujarat Civil Services Tribunal at Gandhinagar. The petitioner therein is a law abiding citizen and he has accepted the order of termination and then filed an appeal before the Tribunal. The order of termination has been made only on the ground that the petitioner, in this petition, failed to pass the Departmental Accounts Examination according to the rules applicable to the service. The petitioner, herein, was appointed as Assistant Agricultural Engineer under the order dated 16-3-1977 purely on temporary and adhoc basis with the stipulation that his services were liable to be terminated after regular and qualified recruits were made available by the Departmental Selection Committee. The petitioner was selected by the Departmental Selection Committee and was given the regular appointment under the order dated 31st May, 1978 which provides that his appointment will be on probation for a period of one year and further that his appointment was subject to his passing the departmental examination as per the Government notification dated 20th August, 1976, within two years and two chances. The petitioner had not passed the departmental examination till the show-cause notice dated 27th September, 1983 was given to him.

16. The petitioner filed an appeal No.124/85 before

the Tribunal and it appears that the petitioners in Special Civil Application No.5807/84 have been impleaded as party therein. The petitioner prayed for a chance and permission to appear in the departmental examination to be held next after the date. He gave his formal application for such permission on 26-11-1983. It appears that the show-cause notice has been given to the petitioner as well as the respondents No.3 and 4 in the appeal, who are the petitioners in Special Civil Application No.5807/84, by the department before terminating their services. In reply to the said show-cause notice, the case of the respondents, the petitioners in Sp.C.A. No.5807/84 was that they are not required to pass the departmental examination whereas the petitioner in Sp.C.A. No.2770/84, as stated earlier, prayed for giving him a chance and permission to appear in the examination to be held next after the date. The respondents, after considering the cases of all the persons, decided to terminate the services, who had failed to appear or pass the departmental examination within stipulated period. The Tribunal has observed that the respondents no.3 and 4 approached to this court and obtained stay against the operation of the order affecting them. So reference has been made by the Tribunal to the Special Civil Application No.5807/84. So far as the respondent No.2, in appeal, is concerned, the Tribunal has held that he filed a civil suit in Baroda and obtained a similar order affecting him. The Tribunal has observed for the petitioner that, "The appellant, however, did not file any legal proceedings and his order had become effective and his services stood terminated pursuant to the impugned order." The petitioner amended his appeal.

17. The contention of the petitioner before the appellate Tribunal was that his case is similar to the respondents No.2 to 4 in the appeal and his services should also be continued. It has further been contended that Shri K.M. Makwana is continued in service though he has failed to clear the departmental examination. Dealing with the contention of the petitioner that his case is similarly situated with the respondents no.2 to 4, the Tribunal held that his case is not similarly situated because those persons are continuing in service under the stay order granted by this court or the civil court at Baroda, as the case may be, and stay order still subsisting. The appellant, the petitioner herein, did not file any legal proceedings either in the Hon'ble High Court or this Tribunal or in the civil court for the stay of operation of the impugned order as it affected him and the order became effective against him from the date of

receipt of the order by him on 5-12-1984 and his order has become effective and his services terminated pursuant to the impugned order. Again the Tribunal has observed that the petitioner instead of approaching any of the judicial authorities who could have stayed the operation of the impugned order against him, he made a complaint to the Commissioner of Labour, Gujarat State, against the said order as he was advised that he was on deputation to the Gujarat Land Development Corporation at the relevant time. On the advise of the Labour Commissioner, the petitioner filed an appeal before the Tribunal. On merits, the Tribunal has declined to grant the relief to the petitioner on the ground that his appointment was subject to the condition as well as by the operation of service rules stipulating that his continuance of service would be subject to his passing the departmental examination in terms of the Government Notification dated 20th August, 1976, and the petitioner has admitted that he has not passed the said departmental examination until the show-cause notice dated 27th September, 1983, was issued to him. The Director of Agriculture sent the matter of the petitioner as well as of the respondents No.2 to 4 in the appeal to the Government, but the Government has not accepted their case, and as such, their services were terminated.

18. The learned counsel for the petitioners contended that in the case of the petitioners in Special Civil Application No.5807 of 1984 a hostile discrimination has been made. In the case of recruitees of the year 1974, exemption from passing of the Departmental Accounts Examination was granted, but the same benefit was not extended to these petitioners. It is next contended that these petitioners have not appeared in the Departmental Accounts Examination as they were under a bonafide belief that in their case the rules were not applicable. This plea of the petitioners in this writ petition, is not without any justification or basis because in the case of earlier appointees their services were regularised from the date of their temporary appointment and if it would have been done in the case of the petitioners then their regular appointment would have been from the date much earlier from the date on which the departmental examination rules were made applicable.

19. In the case of petitioner in Special Civil Application No.2770 of 1986, the counsel for the petitioner contended that he was not given all the chances available to him for passing the examination, though he made a specific request for a chance and permission to appear in the departmental examination to



be held next after the date and in this respect a formal application was also made, but his services were terminated. Carrying further this contention, the counsel for the petitioner contended that the rules made a provision for the increase of the chances as well as the period for passing the examination, but in the case of the petitioner, this relaxation was not considered and straightaway their services were terminated.

20. On the other hand, the counsel for the respondents supported the order of the termination of the petitioners.

21. I have given my thoughtful consideration to the submissions made by the learned counsel for the petitioners. Though the order of termination of the petitioners in Special Civil Application No.5807/84 has not been produced, but it is not in dispute that their services were terminated and they are in service as this court has protected them. In the case of the petitioner in another petition, he was an unfortunate person who has not approached to this court and in his case the interim relief was not granted and his order of termination was given effect to. So those persons who have approached to this court without taking the order of termination have been put in a beneficial position then the poor person who acted as a law abiding citizen, waited for the receipt of the order of his termination and then approached to the Labour Commissioner as advised. The Tribunal has gone to the extent to say that because this petitioner has not been protected by grant of interim relief as he has not chosen to approach to the High Court or civil court or the Tribunal his case is not identical to the petitioners in Special Civil Application No.5807/84 who were respondents in that appeal. That does not stand to the logic and common-sense. Be that as it may. The petitioners in Special Civil Application No.5807/84 are continued in service for all these years and the counsel for the petitioners very fairly submitted that in case this court does not accept the contention that they should be exempted from giving the examination then the petitioners may be given a chance to pass the departmental examination. This court cannot be oblivious of the fact that for the last about more than 12 years these persons are in service may be under the court's order. They are the persons who have been appointed on the post of Assistant Agricultural Engineer after they have been regularly selected. So their appointment on the posts are not the back-door entry or purely a temporary or adhoc appointment. Earlier they were appointed on temporary basis subject to the condition of

their selection by the Departmental Selection Committee and they were called for selection before the Departmental Selection Committee and were found suitable for the post and they have been given the appointment on probation. Rules, 1978 were enacted later on, though were given the effect from retrospective date i.e. the date earlier to the substantive appointment of the petitioner, but it is also a fact that in the case of 1974 recruitees their substantive appointment was made effective from the date of their temporary appointment and they got exemption from appearing in the departmental examination. The petitioners in the Special Civil Application No.5807/84 were certainly not altogether absurd in their approach to go with the impression that as they were appointed earlier to the Rules, 1978, they may also be exempted from appearing in the departmental examination. It is not the case of the respondents that these petitioners have appeared in the examination and failed. On the contrary, they have not appeared in any of the examination under a bonafide belief that they belong to the exempted class.

22. So far as the first contention of the counsel for the petitioners that a discrimination has been made in the case of the petitioners, in the matter of grant of exemption from passing of departmental examination under the Rules, 1978 is concerned, it is wholly devoid of any substance. The 1974 recruitees were appointed much earlier to 20th August, 1976 in substantive capacity, and as such, the Rules, 1978 could not have been made applicable to those persons. Certainly those persons have rightly been considered to be exempted from passing of the departmental examination under the Rules, 1978. The petitioners were appointed in substantive capacity after 20th August, 1976, from which date Rules, 1978, were made effective. What the counsel for the petitioners contended is that their appointment should also be considered substantive from the date of their initial appointment, and if it would have been done in their case also, as it has been done in the case of 1974 appointees, their substantive appointment would have become earlier to 20th August, 1976, and as such, they would have also fallen in the category of exempted employees. There is a fallacy in this contention of the counsel for the petitioners. In the case of 1974 appointees, though their substantive appointment was related back to the date of their temporary appointment, but even if it would not have been done in their case, nothing is turned on merits because otherwise also their substantive appointment was earlier to 20th August, 1976. Those persons were appointed on temporary basis, as per

the petitioners' own case in the Special Civil Application, on 25th May, 1974, and their substantive appointment was made on 3rd December, 1974.

23. The next contention of the counsel for the petitioners that their appointment should have been made substantive from the date of their initial appointment on temporary basis, is also of no merits. The petitioners have given out that initially they were working as Supervisor under the Superintending Engineer, P.W.D. at Ahmedabad, but no details whatsoever has been given of that appointment as well as of the retrenchment from the service. Admittedly, the petitioners were given temporary appointment on 27th May, 1976, on the post of Assistant Agricultural Engineer and their regular appointment has been made on 31st May, 1978. It is not the case of the petitioners that the substantive appointment of any of the person appointed with them has been made effective from the date of the temporary appointment. The counsel for the petitioner is also unable to lay hand on any of the provisions or rules framed under Article 309 of the Constitution or any resolution or circular of the Government which provides that the temporary appointee, on his being selected for the post for substantive appointment, his substantive appointment shall relate back to the date of temporary appointment. So there is no substance in the claim of the petitioners that their temporary services should be taken to be the substantive service. Unless the rule framed under Article 309 of the Constitution or resolution or circular of the Government confers such a right, the petitioners are not entitled for the claim as made by them. In case of the appointees of the year 1974, it is true that their substantive appointment relates back to the date of their temporary appointment, but it is a doubtful proposition whether it could have been done in their case or not, more so when the petitioners are unable to cite any rule or resolution or circular which empowers the department to count their temporary services towards the substantive service. The plea of discrimination can only be made on the basis of legal orders. The order on the basis of which the discrimination is claimed, would not be correct then this court will not permit the plea to be raised and entertained what to say to give any relief thereon. In the case of Chandigarh Administration vs. Jagjit Singh reported in AIR 1995 SC 705, the Hon'ble Supreme Court has held that discrimination on the basis of illegal and unwarranted orders of the authority is not tenable. No benefit can be given to other persons in such case on the ground of discrimination. Similar view has been taken by

this court in the case of Bhanmati Tapubhai Muliya vs. State of Gujarat reported in 1995 (2) GLH 228.

24. In the case in hand, the petitioners making a prayer for relating back their substantive appointment to the date of their temporary appointment so that they may get exemption from appearing in the departmental examination. Rules, 1978, provides for the departmental examination and under those rules also, no provision has been made where the temporary services of the petitioners should be counted towards their substantive service. Rules, 1978, were made effective, as stated earlier, from 20th August, 1976, and as the substantive appointment of the petitioners were after this date, they have to pass the departmental examination for their confirmation on the post. The petitioners were appointed on probation, and as such, Rules, 1978, are applicable to their cases. The petitioners should have appeared in the examination and their plea that the rules are not applicable in their case is wholly without any justification and substance. Instead of having this belief until the department has given out that they are exempted from appearing in the examination, the better course would have been for them to appear in the departmental examination. The chance which has been taken by the petitioners cannot be said to proper and reasonable. The temporary services followed by substantive appointment may be counted for the purpose of pensionary benefits only and for no other purpose. The case of the petitioners is not that they have been given their substantive appointment from the date of their temporary appointment. Not only that, it is also not the case of the petitioners that while giving them the substantive appointment, it has been given out that their past services shall be counted for all the purposes as substantive services. It is a case where the petitioners were appointed purely on adhoc basis without any selection on the post of Assistant Agricultural Engineer on 27th May, 1976. The order of the appointment of the petitioners is on the record of this case and they were given the adhoc appointment till the regularly appointed candidates are made available.

25. Reference may be made to the decision of the Hon'ble Supreme Court in the case of State of Gujarat vs. C.G. Raiyani reported in 1995 (1) SLR 353. In that case, the respondents therein were appointed on 20th May, 1969, on adhoc basis without following any acceptable process of selection. The respondents have applied for and were selected for regular appointment by the Panchayat Services Selection Board and the regularisation was sought to be made with effect from the date of

selection namely, 15-5-1972. So the adhoc services rendered by the respondents between the date of temporary appointment and the date of regular appointment was not taken into account, in that their seniority have been counted only from the date of their selection. The Civil Court as well as High Court has counted their temporary services preceding the selection of the regular appointment of the respondent for the seniority which was not accepted by the Hon'ble Supreme Court. The Hon'ble Supreme Court held that the civil court as well as the High Court have committed grave error of law in fixing the seniority of the respondent from the initial date of fortuitous appointment, namely, the adhoc appointment. So it was a case of seniority, but the principle laid down therein can also be made applicable to the present case.

26. Though on merits the action taken by the respondent to terminate the services of the petitioners may not be illegal or erroneous, but as the petitioners in Special Civil Application No.5807/84 have been protected for all these years and they are working in the services and secondly they have not appeared in the examination meaning thereby it is not the case where they failed, I consider it to be in the interest of justice that they may be given the chances whatever available under the rules for passing of the Departmental Accounts Examination within stipulated period, and only in case they fail or any of them fail to pass the examination in the chances given and within time, as prescribed under the rules, then their services or the services of the petitioner who fail, shall come to an end. It would have been better for the respondent, looking to the fact that the petitioners were regularly selected and they were working for years together, before terminating their services, the petitioners should have been given an opportunity of passing of the examination.

27. So far as the petitioner in Special Civil Application No.2770/86 is concerned, he also deserves to be given the same benefit and reason is very obvious. He is the person who has not come up before this court otherwise he would also have been protected by the court by grant of interim relief and he could have continued in the service for all these years. Now in case this person is not given the benefit only on the ground that in his case there was no interim order in his favour, then certainly it will amount to discrimination as well as discontentment amongst the litigants who instead of coming to this court has availed of the alternate remedy where he has not been protected by interim relief. In

this case also, it is not made clear by both the sides whether the petitioner appeared in the examination or not, but if we go by the Special Civil Application then the petitioner has not availed all the chances. He made a very specific request for giving him one more chance, but nothing has been brought on record by the respondent whether that request has been considered or not and if it is considered on what ground it has felt satisfied to turn down the same.

28. Taking into consideration the totality of the facts of this case, it is also in the interest of justice that this petitioner may also be allowed to avail of the chance or chances minus chances which he has availed of. In case the petitioner passes the departmental examination then he shall be reinstated back in the service forthwith and he shall be entitled for the salary on the post from the date of this order. However, he shall be entitled for the notional benefits as well as the continuity in service for all the purposes i.e. seniority, grade increments, revision of pay-scales, pensionary benefits etc..

29. In the result, both these Special Civil Applications are disposed of with the direction to the respondent that the petitioners in the Special Civil Application No.5807/84 may be given the chances which are provided under the Rules, 1978, for passing of the examination within a specified period and in case they pass the examination or any of them pass the examination, then they or he, as the case may be, shall be continued in service. However, in case the petitioners or any of the petitioners fail in the examination then their or his services shall come to an end from the date of declaration of the result of the examination. In case of the petitioner in Special Civil Application No.2770/86, he shall be given the chance of passing the examination minus the chances which have been availed of and in case, he pass the examination he may be reinstated back in the service forthwith. However he shall not be entitled for the salary for the period from the date of termination of his services till date, but he shall be entitled for the salary from the date of this judgment and he shall be entitled for the notional benefits i.e. his services shall be counted from the date of his regular appointment on selection for all the purposes i.e. for grade increments, revision of pay-scales, seniority, pensionary benefits etc.. In case he fails to pass then he will not be entitled for any relief whatsoever. However, these directions will not come in the way of the respondent to consider the case of the petitioners for grant of

exemption from passing of the departmental examination as provided under Rules, 1978, in the facts and circumstances of the present case. Rule is made absolute in the aforesaid terms with no order as to costs.

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